

The Criminal Conviction of Catalan Secessionist Leaders and European Human Rights Law

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In the [controversial judgment](#) of the Spanish Supreme Court against the Catalan secessionist leaders, seven defendants were found guilty of the crime of sedition (amongst others) and sentenced to prison terms ranging from 9 to 13 years. An appeal to the European Court of Human Rights (hereinafter: the Court) is likely but it is doubtful whether it will be successful.

The Spanish crime of sedition in view of Article 11 ECHR

The conviction of the defendants is based on Article 544 of Spain's criminal code which states:

“Conviction for sedition shall befall those who (...) publicly and tumultuously rise up to prevent, by force or outside the legal channels, applications of the laws, or any authority, official corporation or public officer from lawful exercise of the duties thereof or implementation of the resolutions thereof, or of administrative or judicial resolutions.”

Any appeal to The Court is likely to attack this provision and its application by the Spanish Supreme Court. In particular, its compatibility with the freedom of assembly, which entails the freedom of expression, will be one of the crucial questions. It is enshrined in Article 11 of the European Convention on Human Rights (ECHR) and is to be interpreted in the light of Article 10, as the exercise of the right of freedom of assembly will generally involve the holding and propagation of certain opinions.

The independence referendum as an assembly

But did an assembly actually take place? The thousands of voters that gathered on the streets in different places all across Catalonia did so to cast their vote in the independence referendum. An assembly, however, requires a common purpose of its participants. The act of casting the vote, however, is confidential and in regular elections people thus arguably pursue an individual rather than a collective cause. But obviously what took place on the 1st of October 2017 was far from a regular election. Citizens arrived at the polling stations hours before voting started and stayed hours after the ballot-casting was completed. Their objective was to peacefully and non-violently, by their massive presence, hinder potentially arriving police forces from confiscating the ballot boxes. In this vein, the crowd's conduct

can easily be interpreted as pursuing a collective cause, namely the expression of the opinion “we have the right to vote”. These actions are covered by the Court’s case law on Article 11 ECHR as it has repeatedly found that the lengthy peaceful occupation of premises, even if in breach of domestic law, may be regarded as a “peaceful assembly” as per the Convention ([Cisse vs. France](#), §§ 39, 40; [Annenkov et. al. vs. Russia](#), § 123). Singular and isolated acts of violence do not automatically make an assembly non-peaceful so as to forfeit the protection of Article 11.

Justification of the Verdict: A dim ray of hope?

The freedom of assembly is not absolute, but can be restricted as per paragraph 2 of Article 11.

For the Catalan politicians and activists who have been punished with harsh prison sentences, the crux of the matter, and therefore of the chances of success of an application before the European Court of Human Rights, is whether the sentences are justified.

Here, there seems to be a small ray of hope for the defendants: the sentence needs a legal basis in domestic law, which is formulated with sufficient precision. This requirement shall enable citizens to foresee the legal consequences of their actions. It is often argued that the Spanish crime of sedition is indeterminate. While this view may be tenable, it is primarily the duty of the domestic courts to dissipate any interpretational doubts. The Court’s power to review compliance with domestic law is thus limited. Yet the required foreseeability is not given if domestic judicial practice in the application of a law is contradictory. [José Luis Martí](#) describes various similar cases in which sedition was not applied. He also argues that the Supreme Court’s demarcations of sedition were arbitrarily moulded to fit this particular case *ad hoc*. On this assumption, the deployment of the foreseeability or precision test as to the concrete substance of Spanish sedition law may not be met.

Justification of the Verdict: State’s interests outweigh the separatists’ interests

Notwithstanding this objection, the criminal conviction had the legally legitimate purpose of sanctioning an attempted breach of Spain’s constitutional order. The Constitutional Court had annulled the Catalan parliament’s law that regulated the procedure and effects of the referendum due to its unconstitutionality. By assuming the sovereignty of people of Catalonia in this matter, the law infringed Articles 1.2 and 2 of the Spanish constitution, which declare “the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards” and that national sovereignty belongs to the Spanish people (i.e. all Spanish people). In the words of the Constitutional Court, the Catalan law placed itself outside constitutional legality. It consequently ordered the Catalan authorities to stop the implementation of the law. Regardless of the order, the referendum was organised and executed, by mobilising two to three million voters across the region, eventually leading to the declaration of an independent Republic of Catalonia. These events amounted

to nothing less than a *coup d'état*, as [José Luis Martí](#) and [Victor Ferrerres Comella](#) agree. Each of the defendants had their role in this.

However, it is noteworthy that calls for secession by themselves do not supply enough weight for justifying an interference with Article 11. In [Stankov et. al. vs. Bulgaria](#), the Court emphasised

“(…) that the fact that a group of persons calls for autonomy or even requests secession of part of the country’s territory – thus demanding fundamental constitutional and territorial changes – cannot automatically justify a prohibition of its assemblies. Demanding territorial changes in speeches and demonstrations does not automatically amount to a threat to the country’s territorial integrity and national security. (…)”

The proportionality principle demands that a balance be struck between the State’s interests listed in Article 11 (2) and those of the free expression of opinions.

The protection of a State’s constitutional order is of the highest concern for a nation. Even the ECHR (and other human rights treaties) allows for a derogation of most of its provisions if “the life of the nation” is threatened. However Article 15 allows this only “in time of war or other public emergency” and only “to the extent strictly required by the exigencies of the situation”. The proportionality test requires that the degree of danger which was actually posed to Spain’s constitutional order and territorial integrity by the organisation of the referendum and the mobilisation of up to almost three million voters be inspected.

Even after the referendum and the Catalan parliament’s declaration of independence, Spain’s territorial integrity was at no time endangered. The Constitutional Court had already declared the nullity of the events. The results of the ballot had no legal effect. And also *de facto*, as the Supreme Court itself observed, the Spanish authorities and institutions in Catalonia remained in full control at all times.

What was however threatened by carrying out the referendum was the authority and the binding force of the Constitutional Court’s order. This also appears to be the “*Schutzzweck*” of the Spanish crime of sedition in this case. If Spain had allowed the voting to happen without holding the defiant organisers accountable, arguing that the result would have no effect and will not be recognised anyway, that would have amounted to an untenable abrogation of the rule of law.

Accountability OK – but such a tough sentence?

Considering the above deliberations, could the prison sentences from 9 to 13 years for a non-violent crime be disproportionate? This does not seem to be the case, as the lengths of the sentences correspond with the frame set out by Article 545(1) of the Spanish criminal code, which reads: “Those who have induced, sustained or directed the sedition or who appear as the main doers thereof, shall be punished

with a sentence of imprisonment from eight to ten years, and with that ten to fifteen years if they are persons with the status of an authority. (...)”

Instead, it could be asked on a more fundamental level, if punitive measures should have been applied in the first place. According to the Court, a peaceful demonstration – which the independence referendum essentially, with a few exceptions, appears to have been – should not, in principle, be made subject to the threat of a criminal sanction and notably to deprivation of liberty. However, the conviction seems to have its basis not in the assembly as such, but in the use of the crowds to prevent the enforcement of the Constitutional Court’s order.

Some have argued that sedition should not have been applied, because it is an antiquated crime which does not exist in most democratic countries in the form as it does in Spain. In response to this objection it must be ascertained that the criminal law of a country is a core element of state sovereignty. The Court will not object the application of the domestic laws, so long as their conditions are fulfilled and they proffer adequate safeguards against abuses. At least the possible arbitrariness of the interpretation and application of sedition by Spanish courts may therefore be subject to review by the Court, as described above.

Beyond the law

A final note on the “big picture” that is the underlying conflict: The cause for Catalan independence is not supported by international law, as the right to self-determination does not apply in the Catalan case. Unilateral secession is not permissible under the Spanish constitution and will continue to be met with severe repression. In light of this it should be clear to all concerned, that where there is no legal solution there needs to be a political one. Otherwise the “Catalan crisis” is unlikely to be pacified for years to come, causing further hostility and fractures within Spain’s society.

